

63411-9

63411-9

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2010 FEB 10 AM 9:48

NO. 63411-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ALEXANDER MCLAREN,

Appellant,

v.

DAVID CUTTER AND JILLIAN CUTTER,

Respondents.

REPLY BRIEF OF APPELLANT

Skagit County Superior Court Case No. 05-2-00652-1

Richard J. Hughes, WSBA 22897
HUGHES LAW GROUP, PLLC
825 Cleveland Avenue
Mount Vernon, WA 98273
Telephone: 360-336-6120
Attorneys for Appellant

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
FEB 10 2010

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. REPLY	1

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<i>Adkins v. Aluminum Company of Am.</i> , 110 Wn.2d 128, 750 P.2d 1257, 756 P.2d 142 (1988)	3
<i>Dep't of Revenue v. Boeing Co.</i> , 85 Wash.2d 663, 667, 538 P.2d 505 (1975).....	6, 7
<i>Franz v. Lance</i> , 119 Wn.2d 780, 836 P.2d 832 (1992).....	3
<i>In re Rebecca K.</i> , 101 Wn.App. 309, 317 P.3d 501 (2000)	5
<i>Johnston v. Beneficial Mgmt. Corp.</i> , 96 Wn.2d 708, 638 P.2d 1201 (1982)	4
<i>Murne v. Schwabacher</i> , 2 Wash. Terr. 191 (1883)	9
<i>Neufelder v. Third Street and Suburban Railway</i> , 23 Wash. 470, 63 P. 197 (1900).....	7
<i>State ex rel. Schafer v. Bloomer</i> , 94 Wn.App. 246, 973 P.2d 1062 (1999)	2, 5
<i>Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp.</i> 144 Wash.App. 593, 603, 183 P.3d 1097, 1102 (Wn.App. Div. 3, 2008)	6
<i>Wlasiuk v. Whirlpool Corporation</i> , 76 Wn.App 250, 884 P.2d 13 (1994)	3

Wlasiuk v. Whirlpool Corporation, 81 Wn.App 163, 914 Wn.App
104 (1996) 3

RULES

RAP 2.4 (b) 3
RCW 7.21.030 1
RCW 7.21.030 (2)..... 4
RCW 9A.56.020 7

I. REPLY

Despite arguing to the contrary over the first eleven (11) pages of their Brief, the Cutters ultimately concede that a separate appeal of all of the orders against McLaren for contempt and sanctions are appropriate and properly before this Court. *See Brief of Respondents* page 13. At the end of the day, this Court must determine whether the trial court abused its discretion in ordering McLaren in contempt and sanctioning him, on three separate orders **CP 696-699**; **CP 717-720**; and **CP 792-795**¹ and otherwise sanctioning him, for the non-removal of the Packard House despite McLaren having sold the house to a third party, Tom Hsueh, who agreed to move it but regrettably did not.

Ironically, the Cutters' Brief fails to describe, analyze or argue the statutory prerequisites for any order of contempt as set forth in RCW 7.21.030 including the orders finding McLaren in Contempt and otherwise sanctioning him or relating to the same. That statute requires that the Court had to have correctly (1)

¹ The other orders which were erroneously labeled otherwise are also deficient but addressed previously in the Appellate Brief and won't be re-addressed in this Reply.

determined that McLaren intentionally disobeyed the trial court by selling the house to Hsueh with a proviso that Hsueh move the house and appropriately (2) made a finding that McLaren failed or refused to perform an act that is yet within McLaren's power to perform. The trial court's orders of contempt and sanctions fail to satisfy these statutorily required prerequisites. The Cutters also fail to describe, analyze or refute case law which requires that the trial court had to have provided McLaren a purge clause allowing McLaren the opportunity to avoid contempt and sanctions. *State ex rel. Schafer v Bloomer*, 94 Wn.App 246, 253, 973 P.2d 1062 (1999).

In this case, the November 15, 2006 order arguably allowed McLaren the opportunity to avoid sanctions in the event Hsueh moved the house timely. However, this was improper because the power to act (remove the house) was at that time vested with Hsueh, not McLaren. Moreover the November 15, 2006 order was silent as to whether the Order of Contempt and associated stigma

would be purged upon compliance.² For these reasons, the trial court's orders were an abuse of discretion.

The Cutters' Brief places undue emphasis on the November 15, 2006 and June 13, 2008 orders while discounting the significance of the March 20, 2009 order. It is important to realize that the issue on appeal is not simply what was before Judge Meyer on November 15, 2006, or June 13, 2008, but also what was before Judge Needy on March 20, 2009. After all, Judge Needy continued to find McLaren in contempt and continued to allow the award of sanctions and awarded fees and costs against McLaren. That order **CP 792-795** was timely appealed and by operation of RAP 2.4(b) and the cases of *Wlasiuk v Whirpool Corporation*, 76 Wn.App 250, 884 P.2d 13 (1994) reaffirmed in *Wlasiuk v Whirpool Corporation*, 81 Wn.App 163, 168, 914 Wn.App 104 (1996); *Adkins v Aluminum Company of Am.*, 110 Wn.2d 128, 134, 750 P.2d 1257, 756 P.2d 142 (1988); and *Franz v. Lance*, 119 Wn.2d 780, 836 P.2d 832 (1992), this Court is allowed to

² Each and every other order of contempt and sanction utterly fail to provide McLaren with any purge clause whatsoever.

determine the appropriateness of contempt and sanctions by either the November 15, 2006 order or the March 20, 2009 order.

On November 15, 2006, the trial court knew that McLaren no longer owned the Packard house; it was clear that McLaren had sold the house with a proviso that it be moved. It was also established at that time that the new owner of the house, Tom Hsueh, intended to move the house over the next several months.

The trial court could not properly determine that McLaren intentionally disobeyed its order to move the house since it acknowledged McLaren provided suitable information for a delay to allow the house to be moved.

It was an abuse of discretion to order McLaren in contempt and to further order that he move the house since he was no longer in legal possession of the house. See RCW 7.21.030(2).

In determining whether the facts support a finding of contempt, **the court must strictly construe the order alleged to have been violated, and the facts must constitute a plain violation of the order**. *Johnston v. Beneficial Mgmt. Corp.*, 96 Wn.2d 708, 712-13, 638 P.2d 1201 (1982) (**emphasis added**).

Here, the trial court must have believed that McLaren had sold the house to Tom Hsueh and Mr. Hsueh was diligently working to have the house moved since it issued a purge clause of 75 days to coincide with Mr. Hsueh's request for four (4) months to move the house. That fact alone prevents any finding of contempt since McLaren was not intentionally attempting to evade the requirement to move the house.

The Cutters' election not to address the lack of necessary legal findings sufficient to order McLaren in Contempt are tantamount to an admission that the orders related to contempt were deficient as a matter of law. Moreover, the Cutters misconstrue the purge clause. McLaren should have been allowed an additional opportunity to comply with the Court's order to "move the house" prior to being found in contempt. "An order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt ..." *In re: Rebecca K.*, 101 Wn.App. 309, 314, 317 P.3rd 501 (2000) (quoting *State ex rel. Schafer v. Bloomer*, 94 Wn.App. 246, 253, 973 P.2d 1062 (1999)).

In this case, the first order on appeal found McLaren in contempt and that finding took immediate effect and was unavoidable. **CP 698.** Sanctions or not, as of November 15, 2006, McLaren could not un-ring the bell of condemnation by the trial court; he was in contempt. For this reason, the trial court abused its discretion when it issued its November 15, 2006 order.

Finally, the Cutters argue that the sale of the house to Hsueh is not a valid legal excuse. However, this too misses the point. If McLaren had simply moved or destroyed the house on his own accord, he would arguably have been committing felony theft and other crimes and civil wrongs, since the house was no longer his, but was instead Hsueh's.

Under Washington law, real property includes fixtures, such as machinery that is permanently used in a particular location. *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp.* 144 Wash.App. 593, 603, 183 P.3d 1097, 1102 (Wn.App. Div. 3, 2008); *Dep't of Revenue v. Boeing Co.*, 85 Wash.2d 663, 667, 538 P.2d 505 (1975).

“Classification of property as real or personal property is a mixed question of law and fact. *Id.* It is well recognized that determining what constitutes a fixture as opposed to

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

Finally, the Cutters argue that McLaren could have sued Hsueh for Hsueh's non-removal of the house. However, suing Hsueh, which currently remains financially impracticable, if not impossible, is a red herring. The fact remains that **McLaren was adjudged to be in contempt on November 15, 2006 and McLaren could not have sued Hsueh and obtained judgment against him by January 29, 2007**, the date upon which sanctions commenced. **CP 804-805.**

McLaren contractually allowed Hsueh until approximately January 4, 2006 to move the house and any action for Hsueh's breach would not have arisen until on or after that date. This Court should realize that McLaren's financial impairment was evident since McLaren sold Hsueh the house in order to comply with the

trial court's award of attorneys' fees. **CP 676-678**. To assume a complaint could be drafted, served and have McLaren wait twenty days or more following service and obtain judgment prior to January 29, 2007, is not only conjecture but sheer folly.

Interestingly, the Cutters cite to *Murne v. Schwabacher*, 2 Wash. Terr. 191, a case from 1883, for the proposition that "McLaren did not have the right to make a choice without being in contempt of court." Under that rationale, had McLaren hired movers who subsequently failed to perform, McLaren would be in contempt for not physically placing the house on his back and moving it; ridiculous. Rather, McLaren contracted to have the house moved and that contract was not performed. It was a regular commercial transaction that simply failed; no more and no less. Contempt was not proper let alone inevitable.³

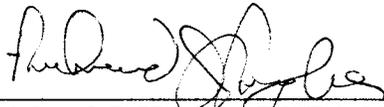
³ The Cutters also try to make hay out of McLaren's counsel's *limited notice of appearance* at the June 13, 2008 hearing wherein the Court again found McLaren in contempt. The Cutters cite to a quote from attorney Hughes regarding McLaren having to "pay the piper". This did not reflect McLaren's choice not to comply with any court order, it was simply a statement of fact, that if the Court of Appeals rules against McLaren he will have to "pay the piper." At the time that statement was made, Hughes had learned of the motion for contempt less than 18 hours prior and made no written notice of appearance and knew of no appeal that had had been made by McLaren regarding the Order of Contempt and Sanction. See Verbatim Report of Proceedings, June 13, 2008 at 7 lines 14-19. Hughes was merely attempting to limit the Cutters unwarranted and

Finally, the subsequent orders utterly fail to include necessary findings and determinations or provide any purge clause and were an abuse of discretion as a matter of law. This Court should find that McLaren's contract with Hsueh was not an intentional effort to avoid the order to remove the house and it should reverse and dismiss all of the orders pertaining to contempt and sanctions including orders allowing fees and costs. It should award McLaren fees and costs based upon his contract with the Cutters and this Court. The imposition of any future orders of contempt and/or sanctions issued to effectuate removal of the house must (1) contain a purge clause sufficient to allow McLaren the opportunity to obtain and enforce a judicial order against Mr. Hsueh and allow for McLaren to purge the order of contempt; and (2) must be sensitive to McLaren's financial and legal capability or incapability to obtain an order forcing Hsueh to remove the house or otherwise have McLaren remove it free from other civil or criminal prosecution.

unsuccessful request to increase sanctions against McLaren from \$250 per day to \$350 per day and was successful in doing so.

RESPECTFULLY SUBMITTED this 9 day of February, 2010.

HUGHES LAW GROUP, PLLC

By: 
Richard J. Hughes, WSBA 22897
Attorney for Appellant

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 FEB 10 AM 9:48

NO. 63411-9-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

ALEXANDER MCLAREN,

Appellant,

v.

DAVID CUTTER AND JILLIAN CUTTER,

Respondent,

DECLARATION OF SERVICE

Skagit County Superior Court Case No. 05-2-00652-1

**Richard J. Hughes, WSBA 22897
HUGHES LAW GROUP, PLLC
825 Cleveland Avenue
Mount Vernon, WA 98273
Telephone: 360-336-6120
Attorneys for Appellant**

ORIGINAL

I, Karen Peirola, am over the age of eighteen, reside in Skagit County and am competent to make the following declaration based upon my personal knowledge and belief:

On February 9, 2010, via email per agreement of counsel and by U.S. Mail, I sent a true and accurate copy of **Appellant's Reply Brief** and a copy of this **Certificate of Service** to John Groen, Groen, Stephens & Kling LLP, 11100 NE 8th Street, Suite 750, Bellevue, WA 98004-4469, attorney for Respondent.

I swear under penalty of perjury under the laws of the state of Washington that the above is true and correct to the best of my belief and knowledge

Dated this 9 day of February, 2010.



Karen Peirola
Legal Assistant for Richard J. Hughes